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IN THE

Supreme Court of the United States

OCTOBER TERM — 1958

No. 302

MRS. GLADYS MAYEAUX LABORDE, ET AL,
Petitioners,

versus

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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OCTOBER TERM—1958

No. 502

MRS. GLADYS MAYEAUX LABORDE, ET AL,
Petitioners,

versus

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

There is no justification for the issuance of a writ of certiorari in this suit for the reasons hereinafter set forth.

OPINIONS BELOW

The opinion of the District Court is unreported as stated in petitioner's application for the writ, but the opinion of the Court of Appeals for the Fifth Circuit is reported in 257 F. 2d 587.

QUESTIONS PRESENTED FOR REVIEW

The questions for review presented by petitioners are based on erroneous assumptions. Since the statement of a question presented is deemed under the Rules to in-

clude every subsidiary question fairly comprised therein, respondent will not attempt to restate accurately what the real questions are at this point but will discuss them in its argument.

STATEMENT OF THE CASE

This suit grew out of a collision at a railroad crossing in the open country when an automobile driven by Mrs. Laborde was struck by a freight train of the Texas and Pacific Railway Company. Plaintiff and her husband were living at the time near the crossing on the west side of US Highway #71, less than 300 feet from the point where the accident happened. The main line of the Railway Company runs approximately north and south parallel to said Highway and is straight for some ten miles south of the crossing. The railroad track is about 85 feet from the Highway.

About 9:30 on the morning of August 11, 1955 Mrs. Laborde got in the family car to go to the O'Neal residence located on the east side of the railroad track. She had made the same sort of trip on previous occasions and was therefore familiar with the surroundings. In order to reach her destination, she drove her car on to Highway #71, turned to the left and travelled north 224 feet to its intersection with a gravel road leading to the O'Neal premises. She turned right on this road with the intention of crossing defendant's tracks. Exhibit D-9 filed in the record by respondent shows accurately the surroundings at the crossing.

The weather was clear. The railroad track was on an elevation four feet above the surface of the road. When Mrs. Laborde first entered Highway #71 a freight train of the Texas and Pacific Railway Company was

approaching the crossing from the south. There was nothing to interfere with her view of it at that time as she was facing the track when she drove out of her yard. When she reached the intersection of the Highway with the gravel road, she turned and drove toward the crossing, without stopping at the intersection. Except for slowing down momentarily when she was thirty feet from the crossing, she drove up on the track in the path of the approaching train in broad daylight. The train was made up of 154 cars and was more than a mile long.

In their bill of complaint plaintiffs charge the Company with negligence on numerous grounds, but in their application to this Court for certiorari, they rely only upon two grounds of alleged negligence. First, failure of the Company to maintain its right of way so as to allow an approaching motorist a view up and down the tracks; second, failure on the part of the locomotive crew to sound timely and effective warning when Mrs. Laborde was seen approaching the track. There is no substantial evidence to justify either of the above charges of negligence. The allegations are not only overwhelmingly refuted by the testimony of defendant's witnesses, but are also contradicted by the witnesses for plaintiffs.

As to the contention that weeds and grass along the edge of the gravel road interfered with Mrs. Laborde's view of a train, plaintiff's witness O'Neal, who had occasion to use the crossing practically every day, said he never had any trouble seeing a train. In answer to questions from the Trial Judge, he said that on the day of the accident he had crossed the track from both ways; that he could see a train coming from the south; that the conditions were similar to those at the time of the accident, and that he never had any trouble seeing a train when he went over this crossing. (R. 69-70-71-72)

As to the contention that the locomotive crew failed to blow the whistle before it reached the crossing, plaintiff was again contradicted by her own witnesses. Her witness O'Neal said there were several blasts of the whistle before he saw the train, and he saw the train before it collided with the automobile. (R. 53-54) The only other witness for plaintiff who saw the accident was Voohries. He heard the train blowing, looked up and saw it approaching the crossing and at this time he saw the automobile of plaintiff moving up the incline toward the track. (R. 92) Voohries had his back to the railroad track and the blowing of the whistle caused him to look around. At the time he looked toward the track, Mrs. Laborde's car was still moving toward the crossing even though she had to drive upgrade.

Plaintiffs filed in evidence a photograph marked P-21 taken by their witness Bowman. Bowman got down behind a bush at a corner where the fence along Highway #71 connected at right angles with a fence along the gravel road leading to the track. The picture he took speaks for itself and shows conclusively that even with the obstructed view to the lens of the camera resulting from the picture having been taken behind a bush, that a train on the tracks was plainly visible. Furthermore, under cross-examination Bowman admitted that he could tell there was a train by looking closely. (R. 112) This is exactly what the law in Louisiana requires of a motorist approaching a railroad crossing and it is a precaution which Mrs. Laborde failed to exercise.

ARGUMENT

I.

QUESTIONS PRESENTED ARE BASED ON ERRONEOUS ASSUMPTIONS

We will first discuss briefly the questions presented in the petition for certiorari, which are astutely framed to imply errors by the Court of Appeals sufficient to warrant a review of its decision by the Supreme Court. Taking them up in the order in which they appear in the petition of plaintiffs we find:

(1) It is claimed that there is an irreconcilable conflict between the various panels of the Court of Appeals for the Fifth Circuit in Louisiana in railroad crossing cases. Respondent shows that the decisions are not irreconcilable as we will point out later herein under the heading "There Is No Conflict of Decisions".

What petitioners fail to realize is that each case must be decided on its own facts. The cases relied on by petitioners are not factually similar to those in the case at bar. As stated by the Louisiana Court of Appeals for the Second Circuit in *Slayter v. T & P Railway Company*, 182 So. 343,

> "However, no two cases are identical in their facts and, in a large measure, each case must be disposed of from its own peculiar facts." (p. 346)

See also *Richardson v. American Employer's Insurance Co.*, 32 So. 2d 108.

Assuming that there is a conflict in the Fifth Circuit regarding decisions relative to railroad crossing accidents in Louisiana, this does not mean that there is any question of federal law involved requiring a decision by

this Court. Ever since *Erie Ry. Co. v. Tompkins*, the federal courts have been required to apply the law of the state in this type of suit. There is presumed to be no federal jurisprudence in negligence cases of this kind. Reconciliations might be necessary if there were a conflict between two federal courts on the same question of federal law. This would be proper in order that there be uniformity of federal jurisprudence. But this is not true with regard to the interpretation of state laws or jurisprudence. If the Supreme Court of the United States were to assume jurisdiction in order to fix the jurisprudence in Louisiana in a case of this kind, it would be failing to apply the law of Louisiana as required in the *Erie Railway Co.* case and subsequent approving decisions. We would have the anomalous situation where the Supreme Court of the United States would be directing the Federal Courts of Appeal to apply substantive law in local matters even though it might conflict with the recognized jurisprudence established by the state courts. In *Cooper v. Brown*, 126 F. 2d 874, Headnote 3 reads as follows:

> "Sufficiency of evidence is a matter of substance within the rule that where federal jurisdiction of cases depends on diversity of citizenship, said court is bound by state law as to matters of substance."

The above was affirmed in principle by a Federal Court of Appeal in *Gulf, Mobile and Ohio Railway Co. v. Freund*, 183 F. 2d 1005, Headnote 12 of which reads as follows:

> "Sufficiency of evidence in a negligence case removed to federal court because of diversity of citizenship is a matter of substantive law governed by the law of the state in which the accident occurred."

Manifestly no amount of strained construction can convert this case into one warranting review by certiorari. In the light of the jurisprudence there is no question of federal law requiring the Supreme Court of the United States to take jurisdiction.

(2) The second question presented by petitioners is whether the Court of Appeals for the Fifth Circuit violated the public policy of the State of Louisiana in railroad crossing cases. This point is based on Louisiana Revised Statutes of 1950, Title 45, Section 563 which is a re-enactment of Act 12 of 1924. Petitioners have placed their own interpretation on the statute. The decision of the Court of Appeals is in keeping with the policy of the State as interpreted in numerous decisions of its courts.

Not one Louisiana case is cited by petitioners in support of their point. Their interpretation in effect is that where a jury holds that a railroad is negligent, or that a motorist is not contributorily negligent, this verdict is final. The statute itself does not say so. The State Courts have not interpreted the statute to mean that the verdict of the jury on contributory negligence is final. It is appropriate to refer to the case of *Henwood v. Wallace*, 159 F. 2d 263 which is cited by petitioners. This is the language of the court:

> "The federal courts are bound by state court decisions construing these parts of the law." (p. 265)

What are the state court decisions? The Courts of Louisiana have never given to the statute the interpretation that the verdict of the jury is not open to question. In *Leger v. T & P Ry.* Co., 67 So. 2d 775, which was tried before a jury, a Louisiana Court of Appeals said:

> "We realize that this case was tried by a jury, however, when its verdict is manifestly erroneous, it is the duty of the appellate court to reverse it." (p. 781)

In *Bihm v. N O & M Ry. Co.*, 6 La. App. 655, the court said:

> "The charge of the Judge to the jury is not in the record. We take it that they were properly instructed, but their verdict and the judgment appealed from based thereon is contrary to the law and the evidence. It is therefore annulled, avoided and set aside, etc." (p. 660)

In *Banfield v. L R & N Ry. Co.*, 137 So. 571, the court said:

> "The case was tried by a jury and by a vote of 9 to 3 the plaintiff was awarded judgment in the sum of $12,377.00." (p. 573)

The Court of Appeals nevertheless reversed the verdict of the jury in the *Banfield* case and the judgment entered theron by the District Court, and rendered a decree in favor of the defendant company. To the same effect are the following decisions by Louisiana appellate courts: *Nolan v. New Iberia & N R Co.*, 145 So. 377; *Wyatt v. Y & M V Ry. Co.*, 127 So. 479 (p. 482); *Franklin v. L & A Ry. Co.*, 120 So. 679 (p. 681).

All of the foregoing Louisiana decisions, and many others that we might cite, deal with the interpretation of Louisiana law by Louisiana courts. They conclusively show that R.S. 45:563 has never been construed to mean that the verdict of a jury on the question of contributory negligence is final.

(3) The third question presented in the petition for

certiorari is whether the Court of Appeals exceeded its reviewing power by making findings of fact at variance with the findings of the jury and the District Judge. The judgment of the Lower Court failed to apply the substantive law of Louisiana in connection with admitted facts as required by the *Erie Ry. Co.* case and subsequent decisions. In our brief in the District Court we referred to the decision in *Audirsch v. T & P Ry. Co.*, 195 F. 2d 629 (Fifth Circuit) where the Court emphasized the substantive law of the State of Louisiana to the effect that a strict duty was imposed upon one crossing a railroad track to exercise due care and prudence to avoid injury, and the greater the danger the greater the care that must be exercised.

The Court of Appeal correctly held in the present suit in keeping with the decisions of the Louisiana courts, that a verdict should have been directed because all the inferences which the jury could justifiably draw from the testimony were insufficient to support a verdict for plaintiff. The following federal decisions also support this principle:

> *F. W. Woolworth Co. v. Davis*, 41 F. 2d 342 (Cert. Den. 282 U.S. 859); *Allen v. Penn. Ry. Co.*, 120 F. 2d 63; *Allen v. T & P Ry. Co.*, 96 F. Sup. 520, 195 F. 2d 545; *Northern Pac. Ry. Co. v. Bacon, 91 F. 2d 173* (Cert. Den. 82 L. Ed. 564); *Southern Ry. Co. v. Walters*, 284 U.S. 190, 76 L. Ed. 239; *Brady v. Southern Ry. Co.*, 320 U.S. 476 (p. 479); *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 75 L. Ed. 983; *Commercial Credit Corporation v. Pepper*, 187 F. 2d 71.

The Court of Appeals decided that there was no substantial evidence with its legitimate inferences to sup-

port the verdict. The Court of Appeals refrained from accepting speculation and possibility as an adequate basis for recovery. It is the rule in Louisiana that negligence is never presumed; that the burden of proving it rests on the one who charges it; that it must be established with reasonable certainty; that the showing of a mere possibility or probability of its existence is insufficient.

The following is a quotation from the case of *Lewis v. Thompson*, 47 F. Sup. 435:

> "Negligence is the breach of a legal duty or obligation; it, or the facts on which it is based must be pleaded and proved; it is never assumed, presumed or predicated upon mere inferences." (Citing *I. C. Ry. Co. v. O'Neal*, 177 Fed. 328, Fifth Circuit, (Cert. Den. 217 U.S. 604, 54 L. Ed. 899).

II.

THE DECISION BELOW IS CORRECT

The decision of the Court of Appeals discloses a careful analysis of the issues, due consideration of the local law, logical reasoning and proper application of the jurisprudence of the State. Appropriate authorities are cited in support of the Court's conclusion. The decision holds that there was no negligence on the part of the Company and that Mrs. Laborde was guilty of contributory negligence. We will discuss briefly under separate headings the question of defendant's negligence and the contributory negligence of plaintiff.

(a)

There was no negligence on the part of the Railway Company.

The first charge of negligence is that the Company didn't maintain its right of way so as to allow an approaching motorist a view up and down the track. We

need only point out that plaintiff's own witness testified to the contrary, as set forth in our Statement of the Case. It is the rule of law in Louisiana that a plaintiff is bound by the testimony offered and produced by him; that one who calls a witness vouches for his veracity and for the correctness of his testimony.

State ex rel Smith v. Dardenne, 58 So. 1032; *Young v. Williamson*, 133 So. 807; *Evans v. Gas & Fuel Co.*, 140 So. 245.

Not only plaintiffs witness but many others, testified that the train could be seen as it approached the crossing. It is a recognized rule of evidence in Louisiana that positive testimony will overcome negative testimony.

Handy v. New Orleans Public Service, 120 So. 271; *Hutchinson v. T & N O Ry. Co.*, 33 So. 2d 139; *Begue v. L & A Railway Co.*, 42 So. 2d 97.

Without considering the overwhelming evidence of defendant, we find that plaintiff failed to show by substantial evidence that she could not see the approaching train. In this connection we refer the Court to photographs D-3 to D-8 inclusive which were taken two days after the accident before there had been any changes at the crossing. It is apparent from these pictures that there is no substantial evidence to support plaintiff's charge of negligence regarding her inability to see the train.

As to the contention that no timely and effective warning was given by those on the locomotive, plaintiff's own witnesses contradicted her on this point. The engineer, fireman and head brakeman who were on the locomotive testified that the whistle started blowing as soon as Mrs. Laborde turned off the highway. They were confirmed in this statement by a Mr. Mayhall who was in a

car behind Mrs. Laborde, saw her when she entered the Highway, and watched her until she went up on the crossing. He stated that the whistle of the train was blowing from the time she entered the gravel road until she reached the tracks. But if this testimony is not to be considered, plaintiff is nevertheless confronted with the fact that two of her own witnesses testified that they heard the whistle before the collision as pointed out in our Statement of the Case.

If we assume that the whistle was not blown, even though the witnesses on both sides said that it was, there was still no negligence on the part of the Railway Company under the law of Louisiana. It is the uniform jurisprudence of the State that those in charge of a train have a right to assume that a vehicle approaching a crossing will stop in time to avert an accident, and there is no negligence in their failure to anticipate that this will not be done.

Bordenave v. T & NO Ry. Co., 46 So. 2d 524; *Levy v. Ry. Co.*, 20 So. 2d 559; *Hanks v. Ry Co.*, 62 So. 2d 139; *Wright v. Ry. Co.*, 19 So. 2d 894.

(b)

There was contributory negligence on the part of Mrs. Laborde.

The contributory negligence of the plaintiff was fully established by her own admissions and by the testimony of her witnesses. Whether she underestimated the speed of the train as it approached the crossing, or whether she assumed that she could get over the crossing ahead of the train, or whether she was engrossed in her own thoughts and didn't look or listen, makes no difference. The facts are that she could and should have seen the train and her failure to do so was contributory neg-

ligence. Under the jurisprudence of Louisiana contributory negligence of a plaintiff in the slightest degree precludes recovery.

> "Negligence is contributory in a legal sense when and only when it is a proximate cause of the injury, and if such contribution exists in the least degree there can be no recovery." *Daricek v. Forest*, 173 So. 601, (p. 603).

It is the accepted law in Louisiana that no failure on the part of a railroad company to do its duty will excuse anyone from using his sense of sight and hearing upon approaching a railway crossing; and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of contributory negligence. It is also the uniform jurisprudence in Louisiana that whatever a motorist can see, he must and in legal contemplation does see.

> *Sullivan v. Locke*, 73 So. 2d 616; *Slayter v. T & P Ry. Co.*, 182 So. 343; *Matthews v. New Orleans Terminal Co.*, 45 So. 2d 547; *Wyche v. Bryan*, 28 So. 2d 143; *Vigilant Insurance Co. v. Lumbermen's Mutual Casualty Co.*, 85 So. 2d 87.

The federal courts in Louisiana have consistently applied this rule.

> *Brinson v. IC Ry. Co.* 241 F. 2d 494; *Allen v. T & P Ry. Co.*, 195 F. 2d 545; *Northern Pac. Ry. Co. v. Bacon*, 91 F. 2d 173; *Lewis v. Thompson, Trustee*, 47 F. Sup. 435; *Teston v. Thompson, Trustee*, 77 F. Sup. 823; *IC Ry. Co. v. Leichner*, 19 F. 2d 118.

But if the view was obstructed to the extent described by Mrs. Laborde then she is faced with this dilemma—that she should have taken more than ordinary precautions before attempting to cross the track, and

should have stopped and looked for the train at a place where such action would have been effective. She merely paused, and did so according to her testimony, at a point where she was unable to see anything.

> "The duty to stop, look and listen before crossing a railroad must be performed at a time and place where stopping, looking and listening will be effective." *Young v. La. Western Ry. Co.*, 95 So. 511; *Dardenne v. T & P Ry. Co.*, 127 So. 458; *Wyatt, et al v. Y & MV Ry. Co.*, 127 So. 479.

> "The more difficult it is for them (motorists) to hear or see approaching trains, the greater degree of caution the law requires, because the track itself constitutes a warning of danger, especially where familiar with such crossings and its frequent use as here shown." *Teston v. Thompson*, 77 F. Sup. 823; *Barnhill v. T & P Ry. Co.*, 33 So. 63; *Ill. Central Ry. Co. v. Leichner*, 19 F. 2d 118.

In *Hutchinson v. T & N. O. Ry. Company*, 33 So. 2d 139, plaintiff was travelling on a highway parallel to the railroad and, as in the present case, entered another road to cross the track. He failed to see an approaching freight train and claimed that the view to the east and west was obscured by crossing signs, poles, weeds and bushes. The court answered his contention by stating:

> "Even if the weeds had obscured plaintiff's view as he claims, his duty to stop, look and listen was the more encumbent upon him." (p. 143).

To the same effect is *Stelly v. T & N O Ry. Co.*, So. 2d 640; *Perrin v. New Orleans Terminal Company*, 74 So. 160; *Thompson v. Morgan*, 119 So. 69.

The decision of the Court of Appeals is correct as to contributory negligence on the part of petitioner. The

only justification for deciding against respondent would be to accept Mrs. Laborde's unsupported statement that she could not see or hear the train as it approached the crossing. We do not believe that any court will give credence to the unsupported testimony of a witness that she could not see a train when such evidence conflicts with that of all the other witnesses and with hpysical facts, in view of the holdings of the Louisiana courts. As stated by the Court in *Matthews v. New Orleans Terminal Company, supra*, regarding a motorist's duty at a railroad crossing:

> "He must see that which may be seen and hear that which may be heard, and he is held to have seen that which he could have and should have seen." (p. 552).

III.

THERE IS NO CONFLICT OF DECISIONS

Petitioner attempts to show that the decision in the present case is contrary to, or inconsistent with other decisions and that there is a conflict in the decisions rendered by various panels of the Court of Appeals for the Fifth Circuit in cases involving collisions at railroad crossings in Louisiana. The substantive rights of parties are to be determined by local law, and there is no federal jurisprudence in negligence cases of this kind which requires a reconciliation of decisions. Assuming that the Supreme Court of the United States will attempt to reconcile conflict of decisions in this type of litigation, it is respondents contention that there is actually no conflict but only factual differences.

Pokora v. Wabash Railway Company cited by petitioners merely modifies a ruling in *B & O Railway Co. v. Goodman*, 275 US 66, 72 L. Ed. 167, to the extent that under the latter case the driver of an automobile was re-

quired to stop his vehicle and get out and look for a train if his view was obscured. Justice Cardoza as the organ of the court in the *Pokora* case said with reference to the *Goodman* case:

> "There is no doubt that the opinion in that case is correct in its result, but the Court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy." (p. 1153)

Too much importance should not be attached to the *Pokora* case for the reason that it was decided in 1934 at a time when federal courts had their own jurisprudence in negligence cases. The decision in *Erie Ry. Co. v. Tompkins*, rendered in 1938 changed the rule that had been in effect for many years by declaring that the rights of parties in cases of this kind are to be determined by the jurisprudence of the State in which the accident happened.

Petitioners cite *Henwood v. Wallace*, 159 F. 2d 263. The situation there was different from the case now under discussion, as the crossing was in a town of some size and the train approached it at great speed and without warning. The language of the court was that "The defendant owed a duty to those crossing a street such as the one involved here in a town of some 1400 people not to approach it at a great speed and without warning as some witnesses testified." (p. 264) This does not apply to the present case as the accident happened in the open country and under the jurisprudence which has been uniformly followed in Louisiana, it is permissible for a train to operate at any speed consistent with its safety.

Sullivan v. Y & M V Ry. Co., 8 So. 2d 109; *Guidry v. T & N O Ry. Co.*, 56 So. 2d 611.

Another case cited by plaintiff in an attempt to establish conflict of opinions is *Illinois Central Ry. Co. v. Aucoin*, 195 F. 2d 983. The difference between the *Aucoin* case and the present suit is quite obvious. The collision in the cited case occurred during daylight hours where defendant's tracks intersected Government Street in the commercial area of the city of Baton Rouge. The Court said that "In view of the lack of protective devices at this crossing in a commercial district of a popular city it cannot be said as a matter of law that the railroad company was free from negligence." (p. 985)

Another case relied on by plaintiff as showing a conflict in the jurisprudence is *T & P Railway Co. v. Watkins*, 243 F. 2d 171. In that case a diesel tractor was approaching a crossing in a heavy fog which reduced visibility. The driver of the tractor had his back to the train. Evidence showed that the crossing was in frequent use in connection with farming operations and that notice had been given to the defendant of the dangerous condition. That presents an entirely different situation from the present case where the accident happened in broad daylight, plaintiff was approaching the crossing at right angles and the train was on an elevation four feet above the Highway.

Another case cited by plaintiff is *Rhul v. Missouri Pacific Railroad Company*, 304 SW 2d 16. The case is not similar in its facts to the one at bar. In the *Rhul* case certain pictures offered in evidence were shown to have been taken at a time considerably later than the accident and the evidence showed that they did not reflect the true condition. But aside from this, the *Rhul* case is the decision of a court in Missouri and defendant here is not depending on Missouri jurisprudence and its rights are not to be governed by the decisions in that state.

Petitioners refer to *Smith v. T & P Railway Co.*, 189 So. 316. In that case the facts were different. The fireman discovered plaintiff's perilous position and the court found that he could have sounded the whistle in time to prevent the accident.

Another case cited by petitioners is *Browne v. T & P Ry. Co.*, 193 So. 511. This suit involved the death of a pedestrian. He was in close proximity to the tracks before the train hit him and the court said:

> "His posture and movements were sufficient to indicate to the average mind that he was unaware of the train's approach." (p. 516)

The factual situation in the above case is different from the case at bar.

Finally, plaintiff cites *Guillot v. T & P Ry. Co.*, 8 La. App. 143. This case is against petitioners instead of being in their favor. Two boys were driving toward a crossing in a wagon that was being drawn by a mule. The younger boy was only five years of age and therefore incapable of being guilty of contributory negligence, according to the decision. The older boy, however, was 13 years of age and the Court said that "He was guilty of the grossest kind of negligence in permitting the mule to walk upon the track immediately in front of a fast moving train", and this negligence barred any recovery for damages by his father. This decision, therefore, favors respondent here and can hardly be regarded as a citation in favor of petitioners.

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioners would make it appear that in the issues decided by the Court of Appeals, there lurks an important question of federal law which the Supreme Court should settle. It is evident from the nature of the case that there is no federal question at all. Neither is there a question presented here of importance in the sense that the court should review the case. The Supreme Court has usually denied certiorari when review is sought of a lower court's decision which turns solely upon an analysis of the particular facts involved, or upon the construction of the Court of Appeals of the jurisprudence of the state where the case arises. It is only where a case acquires importance for some other reason that the Supreme Court will attempt to review the opinion and reexamine the facts. The absence of a legal controversy of importance customarily results in a denial of certiorari. This is specially true in a case where merely the facts are in dispute.

Southern Power Co. v. North Carolina Public Service Co., 263 US 508, 68 L. Ed. 413; *Houston Oil Co. v. Goodrich*, 245 US 440, 62 L. Ed. 385.

The Supreme Court has held that it is a court of law "rather than a court for correction of errors in fact finding", and has stated that it "cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error".

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 US 271, 93 L. Ed. 672, and cases cited. (p. 677)

As stated by Chief Justice Taft in *Magnum Import Co. v. Coty*, 262 US 159, 67 L. Ed. 922:

> "The jurisdiction (of the Supreme Court to review a case by way of certiorari) was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioners state on page 6 of their brief that the Court of Appeals has "infringed upon their constitutional right to trial by jury and has deprived them of property without due process of law". This is an exaggerated and unwarranted statement and is not justified by the record. In the final analysis the argument of petitioners amounts to this—that a jury having decided in their favor, the verdict is final, and is not open to question by the courts. The Supreme Court had this to say in *Galloway v. U. S.*, 319 US 372, 87 L. Ed. 1458 regarding the Seventh Amendment to the Federal Constitution:

> "If the intention is to claim generally that the Amendment deprives the Federal Courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century." (L. Ed. p. 1470)

A jury is not at liberty to ignore admitted facts, or draw and inferences or conclusions it desires from established facts, and its verdict will not be allowed to stand when there is no substantial evidence to support it. Speculation and conjecture are not allowed to take the place of legal evidence. The federal courts have consistently upset the findings of a jury where there was no substantial evidence to support it and the verdict was apparently based on speculation and conjecture.

Southern Ry. Co. v. Walters, 284 US 190, 76 L. Ed. 239; *Brady v. Southern Ry. Co.*, 320 US

476, 88 L. Ed. 239; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 US 209; 75 L. Ed. 983; *Aetna Casualty and Surety Co. v Yeatts*, 122 F. 2d 350; *F. W. Woolworth Co. v. Davis*, 41 F. 2d 342 (Cert. den. 282 US 859); *Allen v. Penn Ry. Co.*, 120 F. 2d 63; *Chicago, Mil. & St. Paul Ry. Co. v. Coogan*, 271 US 472, 70 L. Ed. 1041; *Gulf, Mobile & Northern Railroad Co. v. Wells*, 275 US 455, 72 L. Ed. 370.

The decision of the Court of Appeals for the Fifth Circuit as to the law of the State of Louisiana was properly applied in this case and should be accepted. This has been the rule followed by the Supreme Court in cases of this kind and there appears no reason for the Supreme Court to vary the rule in the suit now under consideration. The following is from *Regan v. Merchants Transfer and Warehouse Company*, 337 US 530, 93 L. Ed. 1520:

> "But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. * * * Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie Ry. Co. v. Tompkins* is transgressed." (p. 1523)

CONCLUSION

The evident purpose of petitioners application for certiorari is to have the court classify the present type of litigation with that involving interpretations of a federal statute. This is evidenced by the concluding sentence on page 18 of their brief:

"As this Honorable Court has reinforced the guar-

antees of the Seventh Amendment repeatedly and forcefully in numerous Jones Act and FELA cases in recent years, it is in the public interest that such guarantees be re-emphasized in simple negligence actions and the principle of the *Pokora* case be re-established in railroad crossing cases."

To paraphrase the above we say that petitioners are asking the Supreme Court of the United States to assume jurisdiction where state laws are applicable and to establish federal jurisprudence in negligence action at railroad crossings.

The petition for a writ of certiorari in this case should be denied, and we so pray.

Respectfully submitted,

s/ FRANK H. PETERMAN
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CERTIFICATE

I certify that a copy of the above and foregoing brief for respondent in opposition has been served upon Camille F. Gravel, Jr., counsel for petitioners, by depositing copy of same in the United States mail with postage prepaid addressed to him at his office, 611 Murray Street, Alexandria, Louisiana, this day of December, 1958.

s/ FRANK H. PETERMAN